UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

GLADYS BRYANT,
Petitioner,

and

Case No. 19-RD-223236

EMBASSY SUITES BY HILTON,
Employer,

and

UNITE HERE LOCAL 8,
Union.

PETITIONER GLADYS BRYANT'S REQUEST FOR REVIEW

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REQUEST FOR REVIEW

Petitioner Gladys Bryant submits, pursuant to Rule and Regulation § 102.71, this Request for Review of Regional Director Ronald K. Hook's August 3, 2018 dismissal of her decertification petition pursuant to the recognition bar doctrine established in *Lamons Gasket Co.*, 357 NLRB 739 (2011). Petitioner submits that "[t]here are compelling reasons for reconsideration of an important Board rule or policy" under Rule and Regulation § 102.71(a)(2), namely the Board's recognition bar policy. Petitioner requests that the Board overrule *Lamons Gasket* and either abolish or modify the recognition bar.

ISSUE PRESENTED

Should *Lamons Gasket* be overruled and the voluntary recognition bar abolished or modified?

STATEMENT OF THE FACTS

On March 28, 2018, Embassy Suites by Hilton opened a new hotel in downtown Seattle at Pioneer Square. Petitioner Gladys Bryant was hired as a housekeeper at the hotel, and continues to work there to this day. Approximately a month after the hotel's opening, Hilton announced to its new employees in a letter that they were subject to an organizing agreement with Unite Here Local 8.[1] The union thereafter

1 *See* Letter from Keith Buck to Team Members, Exhibit 1 to Petitioner's Response to the Region's Order to Show Cause (July 31, 2018).

conducted an organizing campaign against the employees pursuant to its agreement with their employer. On May 17, 2018, Hilton recognized Unite Here to be its employees' exclusive representative. *See* Region 19 Order of Aug. 3, 2018.

On July 5, 2018, Petitioner Bryant filed with NLRB Region 19 the instant decertification petition, duly supported by a showing of interest signed by well over thirty-percent of her co-workers. On the same day, she also filed unfair labor practice charges against Unite Here and Hilton that allege, respectively, as follows:

> Unite Here Local 8 has violated the Act by: (1) restraining employees' right to revoke union authorization cards by requiring that they do so in person at union offices and through related misrepresentations; (2) demanding, accepting, and utilizing more than ministerial assistance and support from the Employer with soliciting and obtaining authorization cards from employees; (3) demanding and accepting recognition from the Employer as an exclusive representative at a time during which the union lacked the actual, uncoerced, and untainted support of a majority of employees; and (4) through conduct related to the foregoing.
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> The Employer has violated the Act by: (1) providing more than ministerial assistance and support to Unite Here Local 8 ("Union") with soliciting and obtaining authorization cards from employees; (2) recognizing the Union to be the exclusive representative of its employees at a time during which the union lacked the actual, uncoerced, and untainted support of a majority of employees due to the aforementioned conduct, unfair labor practices committed by the union, and related conduct; and (3) through conduct related to the foregoing. Charging Party requests relief for herself and similarly situated employees, to include temporary injunctive relief.

See Unfair Labor Practice Charges, Cases 19-CB-223341; 19-CA-223234.

On July 10, 2018, the Regional Director ordered, *sua sponte*, that the hearing in this case be postponed indefinitely pending resolution of the unfair labor practice

charges. Faced with this interminable delay in the processing of her election petition, Bryant withdrew her unfair labor charges on July 19, 2018, so that her representation case could proceed. Bryant, however, intends to refile the same or similar unfair labor practices challenging Unite Here's unlawful acceptance of employer recognition in the near future.

On August 3, 2018, Regional Director Ronald K. Hooks dismissed the petition based on the recognition bar that the Board reinstituted in *Lamon's Gasket*. This timely Request for Review follows.

SUMMARY OF ARGUMENT

The Board should abolish or modify the recognition bar for a simple reason: the Board does not know whether an employer-recognized union has the uncoerced support of a majority of employees, and has strong reasons to suspect that it may not. Consequently, when employees file a petition that "assert[s] that the individual or labor organization . . . currently recognized by their employer as the bargaining representative, is no longer a representative," the Board should find that a "question of representation" exists and "direct an election by secret ballot" to ascertain if employees truly desire that union's representation. 29 U.S.C. § 159(c).

The Board's current policy of quashing employees' statutory right to a secret ballot election, based on blind deference to recognition agreements between employers and unions, places the Act on its head. The Act exists to protect employee

rights *from* employers and unions. *See* 29 U.S.C. § 158. Consistent with Act, the Board cannot "place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738-39 (1961). Yet, that is what the Board is doing with its recognition bar policy: placing in self-interested employer and union hands the power to suppress employees' right to vote on whether they want union representation.

The Board should overrule *Lamons Gasket* and hold that an employer's decision to recognize a union does not impede, in any way, an employee's statutory right to a secret-ballot election. This holding will be consistent with the Act, promote employee free choice, facilitate lawful collective bargaining, and resolve absurd results created by the recognition bar announced in *Lamon's Gasket*.

In the alternative, the Board should hold that employees' can request an election for six months after being notified that their employer recognized a union to be their representative. This six month time period is the same as the statute of limitations for unfair labor practice charges, and will allow employees to challenge the propriety of a union's recognition through either process during the same time period. This rule will harmonize the two procedures, and bring a measure of certainty to employees, employers, and unions following an employer's recognition of a union.

ARGUMENT

I. The Board Should Conduct Elections Following Employer Recognition of a Union Because It Cannot Blindly Accept That An Employer's Recognition Reflects the Uncoerced Choice of Employees.

A. The Board Does Not Know If Employer-Recognized Unions Have the Uncoerced Support of a Majority of Employees.

The underlying flaw in the Board's recognition bar policy is informational in nature. When the Board applies its recognition bar to quash an employee's election petition, the Board does not know if that employer-recognized union has the uncoerced support of a majority of employees. Voluntary recognition is a private agreement between an employer and union. The Board is not a party to a recognition agreement. It does not approve of them either before or after employers and unions enter into them. In short, "[t]he fact that an employer bargains with a union does not tell [the Board] whether *the employees* wish to be represented by the union." *Seattle Mariners*, 335 N.L.R.B. 563, 567 n.2 (2001) (Member Hurtgen, dissenting).

Employers and unions usually include verbiage in recognition agreements stating that the union obtained authorization cards from a majority of employees. That assertion is sometimes unsubstantiated, as it was in *Nova Plumbing, Inc. v. NLRB,* 330 F.3d 531 (D.C. Cir. 2003), and *Colorado Fire Sprinkler v. NLRB,* 891 F.3d 1031 (D.C. Cir. 2018), where employers and unions agreed that the union had proven majority employee support when, in fact, no such proof had been offered.

But even where a union produced authorization cards from a majority of employees, the Board still has no knowledge of the conditions under which those cards were procured from employees. The Board does not know if the cards were obtained by the union through coercive means, obtained by the employer, or if employees revoked or tried to revoke those cards. The Board will not even evaluate those issues in if they are raised by a party a representational hearing.[2] The Board does not know, when it applies a recognition bar, if a true and uncoerced majority of employees want the representation of an employer-recognized union.

Verification by a third-party arbitrator that a majority of employees signed union authorization cards does not change this reality. These arbitrators also have no knowledge of how the union authorization cards were obtained from employees. They are little more than human calculators, whose role is merely to count the cards provided by the union against a list of employees provided by the employer. Their verification of a card-check says nothing about the conditions under which the union and/or employer obtained authorization cards from employees, and thus says nothing about whether an employer-recognized union truly enjoys employees' support.

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2 *See Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 707 (D.C. Cir. 1965); *Union Manufacturing Co.*, 123 N.L.R.B. 1633, 1633-34 (1959); *Worden-Allen Co.,* 99 N.L.R.B. 410, 410 n. 1 (1952); NLRB Casehandling Manual, ¶¶ 11228 and 111184.

This case illustrates the foregoing points. Embassy Suites agreed to recognize Unite Here based on a card check verification in which an arbitrator found that a majority of bargaining unit employees signed authorization cards.[3] Region 19 dismissed Bryant's decertification petition, pursuant to the recognition bar, based on that recognition agreement. When dismissing Bryant's petition, Region 19 did not know if those authorization cards reflected the uncoerced choice of employees. In fact, Region 19 had reason to believe the cards were tainted, as Bryant alleges that those cards are the products of unlawful coercion. *See* Unfair Labor Practice Charges, Cases 19-CB-223341; 19-CA-223234.[4] Yet, under the Board's recognition bar policy, Region 19 had no choice but to blindly defer to the Unite Here and Embassy's Suites' recognition agreement and quash Bryant's statutory right to an election.

B. The Board Cannot Defer to Self-Interested Employer and Union Decisions About Whether Employees Want Union Representation.

In addition to not knowing if an uncoerced majority of employees truly support employer-recognized unions, the Board has strong institutional and practical reasons not to defer to employer and union claims concerning employee representational preferences. To wit, (1) the Board's statutory duty is to protect employee rights from

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3 *See* Union Authorization Card Verification, Exhibit to Region 19's Notice to Show Cause.

4 The proposition that the Board should only investigate through unfair labor practice proceedings, and not through representation proceedings, whether an employer recognized union has the uncoerced support of employees is addressed in Section C, *infra*.

employers and unions; (2) unions and employers enter into recognition agreements for self-interested reasons unrelated to effectuating employee free choice; and (3) union authorization cards are obtained from employees under conditions that fall far short of laboratory conditions that exist in Board conducted elections.

1. *The Board Cannot Entrust Employee Rights to Employers and Unions Because the Board's Statutory Duty Is To Protect Employee Rights From Employers And Unions.*

"The *raison d'être* of the [NLRA's] protections for union representation is to vindicate the *employee*s' right to engage in collective activity and to empower *employees* to freely choose their own labor representatives." *Colorado Sprinkler*, 891 F.3d at 1038. Consistent with this purpose, Section 7 of the Act grants "employees" the right to choose or reject union representation. 29 U.S.C. § 157. Sections 8(a) and 8(b) of the Act protect these employee rights *from* employers and unions. 29 U.S.C. § 158(a)-(b). Section 9(c)(1)(A) empowers the Board to determine if employees want to be represented by a union that "is being currently recognized by their employer as the bargaining representative." 29 U.S.C. § 159(c)(1)(A).

Under this statutory framework, the Board cannot defer to employer and union decisions about how employees want to exercise their Section 7 and 9 rights, as it does with its recognition bar policy. It is akin to a chicken farmer deliberately entrusting foxes with guarding his henhouse.

The Supreme Court has found "nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *Auciello Iron Works v. NLRB*, 517 U.S. 791, 790 (1996). The Court also found that deferring even to "good faith" employer and union beliefs about employee representational preferences "place[s] in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Ladies Garment Workers*, 366 U.S. at 738-39.

When the Board has strayed from these principles, the courts have sharply reprimanded the agency for its error. In *Nova Plumbing*, the D.C. Circuit rejected the proposition that an employer-union recognition agreement alone proves that the employees want union representation. 330 F.3d at 536-37. The court held that proposition "runs roughshod over the principles" of employee choice, "completely fails to account for employee rights," and creates a risk of the union and employer "colluding at the expense of employees and rival unions." *Id*. "[B]y focusing exclusively on employer and union intent," the court found that "the Board . . . neglected its fundamental duty to protect employee § 7 rights." *Id*. at 537.

The D.C. Circuit recently reiterated these points in *Colorado Sprinkler*, and again reversed the Board for accepting that an employer and union's agreement that employees supported union representation proved that the employees actually wanted

that union's representation. 891 F.3d at 1038-41. The Court recognized that a "document [concerning] the union's and employer's views on Section 9(a) status . . . say nothing about the pivotal question of employee support for the union." *Id*. at 1040. "It is the 'employees[']' freedom of choice and majority rule" that Section 9(a) "guarantees." *Id*. (quoting *Garment Workers' Union*, 366 U.S. at 737). "That choice cannot be arrogated by a union or an employer." *Id*.

The recognition bar policy violates these principles by permitting unions and employers to arrogate to themselves employee freedom choice. The Board must cease its abdication of its statutory duty to protect employees from employers and unions, and conduct secret ballot elections upon employee requests to determine if employees desire the representation of an employer-recognized union.

2. Employers and Unions Enter Into Recognition Agreements to Satiate Perceived Self-Interests, Not to Effectuate Employee Free Choice.

The Board also should not defer to employer-union recognition agreements because the parties do not enter into them for the altruistic motive of effectuating employee free choice, but for self-interested reasons. A union's motive for coveting employer recognition is obvious: to gain more dues-paying members and fee payers. Employers recognize unions, or agree to do so in the future, to satiate perceived business interests. This includes obtaining union promises to cease or not begin co-

ercive "corporate campaigns" against them;[5] to obtain union political assistance;[6] to cut off organizing campaigns of unions less-favored by the employers;[7] to obtain union concessions at the expense of other employees the unions represents;[8] or to obtain union concessions at the expense of future represented employees.[9] Given the self-interests at work, it is naïve for the Board to assume that an employer's decision to recognize a union means that employees truly want that union's representation.

Recognition agreements are especially suspect when, as here, they are products of a pre-arranged organizing agreement between the employer and union. In an organizing agreement, an employer commits to assist a particular union with obtaining from its employees the authorization cards that will later be used to justify the em-

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[5] *See, e.g.,* Laura J. Cooper, *Privatizing Labor Law: Neutrality/CheckAgreements and the Role of the Arbitrator,* 83 Ind. L.J. 1589, 1591-93 (2008); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999); *Pichler v. UNITE,* 228 F.R.D. 230, 234-40 (E.D. Pa. 2005)*, aff'd*, 542 F.3d 380 (3d Cir. 2008); *Smithfield Foods v. UFCW,* 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008).

[6] *See, e.g.*, *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1289 (11th Cir. 2010).

[7] *See, e.g., Price Crusher Food Warehouse*, 249 N.L.R.B. 433 (1980).

[8] *See, e.g., Adcock v. Freightliner*, LLC, 550 F.3d 369, 372 (4th Cir. 2008); *Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993); *Kroger Co.*, 219 N.L.R.B. 388 (1975).

[9] *See ,e.g.,* Cohen, 20 Notre Dame J.L. Ethics & Pub. Policy at 533-34*; Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds,* 355 F.2d 854 (2nd Cir. 1966); *Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (moot on appeal); *Plastech Eng. Prod.,* (*Int'l Union, UAW*), 2005 WL 4841723, *1-2 (N.L.R.B. Div. of Advice Memo. 2005); *Adcock,* 550 F.3d at 372.

ployer's recognition of the union.

Among other things, in organizing agreements employers usually commit to gag managers and supervisors from providing employees with information about the union and from answering employee questions about the same, just as Embassy Suites did in its organizing agreement with Unite Here.[10] These gag-clauses prevent the "uninhibited, robust, and wide-open debate" between employers and unions that the NLRA encourages so that employees can make informed decisions about union-ization. *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008).[11] "It is difficult, if not impossible to see . . . how an employee could intelligently exercise [her] rights, especially the right to decline union representation, if the employee only hears one side of the story—the union's." *Healthcare Ass'n v. Pataki,* 388 F. Supp. 2d 6, 23

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10 *See* Letter from Keith Buck to Team Members, Exhibit 1 to Petitioner's Response to the Region's Order to Show Cause (July 31, 2018) (stating that "[b]ecause the employer has a neutral position, your managers and supervisors have been instructed not to discuss and/or answer questions on this matter as they cannot indicate or imply any preference for or opposition to any particular union.").

11 *See also Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available"); *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986) (employer speech "aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance"); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) ("it is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right").

(N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006). "[H]indering an employer's ability to disseminate information opposing unionization 'interferes directly' with the union organizing process which the NLRA recognizes." *Id*. (citation omitted).

Employers, including Embassy Suites here, also often agree in organizing agreements to provide union organizers with personal information about nonunion employees and access to their workplace.[12] The NLRA, however, does not grant unions a right to use employer property for organizing, *see Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992), or a right to employees' information prior to petitioning for an election, *Always Care Home Health Serv*., 1998 WL 2001253 (NLRB G.C. 1998).

The propriety of an employer's recognition of a union is inherently questionable when the employer assisted that union with attaining recognition. The Board's decisional law is chock full of cases in which employers unlawfully assisted unions with organizing their employees.[13] The Board cannot presume that recognition agree-

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12 *See* Letter from Keith Buck to Team Members, Exhibit 1 to Petitioner's Response to the Region's Order to Show Cause (July 31, 2018) (informing employees that, pursuant to their organizing agreement, "representatives of the Union will be visiting the Hotel to speak with you about the Union and signing union authorization cards" and that "the agreement with the Union requires that we provide the Union with a list of all your names, job classifications, departments, phone numbers, and home addresses.").

13 *See, e.g.*, *Duane Reade, Inc.*, 338 NLRB 943 (2003), *enforced sub nom. Duane Reade Inc. v. NLRB*, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (union and employer conspire to achieve "voluntary recognition" of a minority union favored by the employer); *Shore Health Care Ctr., Inc.*, 317 NLRB 1286 (1995), *enforced sub nom. Fountainview Car Ctr. v. NLRB*, 88 F.3d 1278

ments that are the fruits of these collusive arrangements reflect the true and uncoerced will of employees.

3. *Employer Recognition Occurs Under Circumstances That Fall Far Short of the Laboratory Conditions That Protect Employee Free Choice in Secret Ballot Elections.*

Finally, the Board should not suppress employees' right to secret ballot elections out of deference to the results of card check campaigns because the latter offers far weaker protections to employee free choice than the former. Employer and unions can, and often do, engage in conduct during card check campaigns that would not be tolerated in a Board conducted election.

For example, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee choice in an NLRB-conducted election: electioneering activities at the polling place, *see Alliance Ware Inc.*, 92 NLRB 55 (1950)

(D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); *NLRB v. Windsor Castle Healthcare Facilities, Inc.*, 13 F.3d 619 (2d Cir. 1994), *enforcing* 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); *Kosher Plaza Supermarket*, 313 NLRB 74, 80-82 (1993) (employer threatens discharge of employees who refuse to sign cards for favored union); *Brooklyn Hosp. Ctr.*, 309 NLRB 1163 (1992), *aff'd sub nom. Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Union v. NLRB*, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); *Famous Casting Corp.*, 301 NLRB 404, 407 (1991) (employer unlawfully supported union and coerced employees into signing authorization cards); *D & D Dev. Co.*, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); *Roundup Co.*, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees, at the expense of a rival union).

and *Claussen Baking Co.*, 134 NLRB 111 (1961); prolonged conversations by representatives of a union or employer with prospective voters in the polling area, *see Milchem Inc.*, 170 NLRB 362 (1968); electioneering among the lines of employees waiting to vote, *see Bio-Medical Applications of P.R.*, 269 NLRB 827 (1984) and *Pepsi Bottling Co. of Petersburg*, 291 NLRB 578 (1988); speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election, *see Peerless Plywood Co.*, 107 NLRB 427 (1953); and a union or employer keeping a list of employees who have voted as they went into the polling place (other than the official eligibility list). *See Piggly-Wiggly*, 168 NLRB 792 (1967).

The above conduct, which disturbs the laboratory conditions necessary for employee free choice in an election does not, without more, amount to an unfair labor practice. Yet, analogous conduct occurs in almost every card check campaign. The place where an employee signs (or refuses to sign) a card is the functional equivalent to a polling place in an election, as it is where the employee makes his or her choice. When an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign. This solicitation could occur during or immediately after a union or company mass meeting. The employee's decision is not secret, as in an election, since the union clearly has a list of who has signed a card and who has not.

In sharp contrast, each employee participating in an NLRB-conducted election makes his or her choice in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has made the decision by casting a ballot, the process is at an end. A secret-ballot election provides far greater protections for employee free choice than a recognition campaign.

The Board substantially modified the recognition bar in *Dana Corp*., 351 N.L.R.B. 534 (2007) for this reason, finding that "[t]he preference for the exercise of employee free choice in Board elections has solid foundations in distinctions between the statutory process for resolving questions concerning representation and the voluntary recognition process." *Id.* at 439. Specifically, *Dana* set forth four rationales for why a secret ballot election is a more reliable gauge of employee preference than employer recognition. *First*, Board supervised elections have a great advantage over card check campaigns in preventing union and employer coercion of voters. *Id.* at 438-439. *Second*, there is a strong potential for unions or employers to provide misinformation to employees about the card check process. *Id.* at 439. *Third*, secret ballot elections are more fair and democratic than card check campaigns. *Id. Last*, there are due process advantages to secret ballot elections that do not exist in card check campaigns. *Id.* at 439-440 (footnotes omitted). All of these rationales remain as valid today as they were when announced in *Dana*.

* * *

For these reasons, the Board cannot presume that employer-recognized unions enjoy the actual and uncoerced support of a majority of employees when employees challenge that recognition with an election petition. That is not to say that the Board should affirmatively presume that employer-recognized unions lack employee support. Rather, the Board cannot make a presumption one way or the other given its lack of information, but must acknowledge that the employee petition proves that an unresolved question of representation exists under Section 9(c).

C. The Board Should Permit Employees to Contest the Validity of Employer Recognition with Representational Petitions, and Not Just with Unfair Labor Practice Charges.

Given that the Board does not know if an employer recognized union has the uncoerced support of a majority of employees, and has strong institutional and practical reasons for doubting that it does, the proper course of action is readily apparent when employees challenge that union's status with an election petition: the Board must find that "question of representation exists" under Section 9(c) and "direct an election by secret ballot" to resolve it. 29 U.S.C. § 159(c)(1).

The Board can do no better than a secret-ballot election to evaluate employee free choice in the wake of an employer's recognition of a union. The NLRB's statutory representation procedures were established precisely to evaluate under "laboratory conditions" the "uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB

124, 127 (1948). "Secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *see Linden Lumber Div., Summer & Co. v. NLRB,* 419 U.S. 301, 304, 307 (1974) (similar).

The Board majority in *Lamon's Gasket* averred that employees' ability to challenge an employer's recognition of a union with unfair labor practice charges obviates the need for an election. 357 NLRB at 746-47. The contention is baseless. Congress provided employees with a statutory right to file *both* an election petition challenging an employer recognized union, 29 U.S.C. § 159(c)(1)(A)(ii), and unfair labor practice charges challenging the same, *id*. at § 160(b). These procedures are not mutually exclusive—i.e., the availability of Section 10 unfair labor practice proceedings does not deprive employees of their Section 9(c) right to an election.

The procedures are also not interchangeable. Unfair labor practice proceedings are designed to determine whether employers and unions committed unfair labor practices, and feature after-the-fact investigations and adjudications. The procedure is not designed to measure employee support or opposition to a union. That is the function of a representation proceeding, which exists to evaluate whether a majority of employees truly support an employer-recognized union.

The Board applies a more stringent standard of union and employer conduct in representational proceedings than in unfair labor practice proceedings. *General Shoe*

Corp., 77 N.L.R.B. at 127. Conduct that does not rise to the level of an unfair labor practice can interfere with employee free choice under the laboratory conditions standard used in representation proceedings. *Id*. The Board should permit employees to test their employer's recognition of a union under the procedure that best effectuates employee free choice, which is a secret-ballot election.

A secret-ballot election also is a faster means for resolving whether employees support an employer-recognized union. While unfair labor practice proceedings can grind on for years, the median number of days from a petition to an election in Fiscal Year 2017 was 22 days with an election agreement and 36 days when contested.[14] An election is a far superior means to: (1) protect employee § 7 rights by promptly removing a union that employees do not support, and (2) foster collective bargaining by solidifying the status of unions that actually enjoy majority employee support. In contrast, relying solely upon unfair labor practice proceedings can leave employees, employers, and unions in limbo for years as the charges are processed. Unfair labor practice charges are no substitute for secret-ballot elections when it comes to expeditiously determining if employees want a union's representation.[15]

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14 https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election

15 Allowing the General Counsel to resolve what is effectively a representational issue—determining whether the union recognized by an employer has the uncoerced support of a majority of employees—should also give the Board pause, as Congress empowered only the Board to decide representational issues. *See* 29 U.S.C. 159.

II. *Lamon's Gasket* Should Be Overruled and the Recognition Bar Abolished or Modified.

A. *Lamon's Gasket* Should Be Overruled.

The Board should grant the request for review, and overrule *Lamon's Gasket*, primarily for the reason set forth above. The recognition bar doctrine reinstituted in that case illogically dictates that the Board not conduct elections to determine if employer-recognized unions have employees' uncoerced support based on the assumed premise that employer-recognized unions have employees' uncoerced support. The Board, however, does not know if that assumed premise is true, and has strong reasons to suspect that it may not be. The recognition bar doctrine is irrational, being predicated on circular logic, and should be abandoned for that reason alone.

Lamon's Gasket should also be overruled for other reasons. The recognition bar policy announced in that case: (1) is inconsistent with the Act; (2) is incompatible with employee free choice; (3) undermines collective bargaining; and (4) is difficult to administer and leads to absurd results.

First, Section 9(c) of the Act grants employees a statutory right to petition for an election "assert[ing] that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative." 29 U.S.C. § 159(c)(1)(A)(ii). Congress prohibited such elections only when, "within a twelve month period, a valid *election*

shall have been held." *Id.* at § 159(c)(3). A similar bar against elections after recognition was not included in the statute.

Congress' omission of a bar following employer recognition was intentional. "A certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election." *Gissel Packing*, 395 U.S. at 598-99. Among the special privileges enjoyed only by Board-certified unions include "protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (§ 9(c)(3)), [and] protection for a reasonable period, usually one year, against any disruption of the bargaining relationship because of claims that the union no longer represents a majority." *Id.* at 599 n.14.

The Board's decision in *Lamon's Gasket* to shield employer-recognized unions from election petitions is inconsistent with this Congressional intent to shield only Board-certified unions from election petitions. Member Hayes recognized this in his dissent in *Lamon's Gasket*:

> The Act itself does not impose . . . a bar in the wake of voluntary recognition. It imposes an election bar *only* after there has been a valid Board election. In the same manner, the Act provides that certification of a union's representative status must be based on Board election results. In other words, the Taft-Hartley Act, Congress . . . chose not to give voluntary recognition either election bar quality or the special protections of 9(a) certification status. The choice was not surprising, inasmuch as Senator Wagner, leading proponent of

> the original Act bearing his name, contemplated employee votes in a Board election as the seminal reflection of workplace democracy. Based on this statutory scheme voluntary recognition is clearly not so privileged as to assume that an immediate postrecognition bar to a Board election is required.

357 NLRB at 749-50 (Member Hayes, dissenting) (footnote omitted).

Second, barring employees from filing election petitions impinges on employees' Section 7 right to choose or reject union representation. This is the paramount interest under the Act. *See Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *Colorado Sprinklers*, 891 F.3d at 1038. Indeed, the only "right" the Act grants is the Section 7 right granted solely to "employees." 29 U.S.C. § 157; *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

Third, the recognition bar undermines the Act's subsidiary interest in "encouraging the practice and procedure of collective bargaining," 29 U.S.C. § 151, because the Act encourages collective bargaining only when an uncoerced majority of employees support union representation. 29 U.S.C. § 159(a). As the Board recognized in *MV Transportation* when it overturned the so-called "successor bar":

> It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice with respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships. The first of these is explicitly set forth in Section 7 of the Act. The second is a matter of policy and *operates with respect to those situations where employees have chosen a bargaining relationship*.

337 N.L.R.B. 770, 772 (2002) (citations omitted) (emphasis added); *see also Levitz*

Furniture, 333 N.L.R.B. at 731 (Member Hurtgen, concurring) (recognizing that [t]he preamble and the substantive provisions of the Act . . . pronounce a policy under which our nation protects and encourages the practice and procedure of collective bargaining for those employees who have freely chosen to engage in it"). Stated conversely, there is no interest in encouraging collective bargaining absent majority employee support for it. *See Ladies Garment Workers*, 366 U.S. at 737-38.

Barring election petitions that assert that employer-recognized unions lack employee support does not facilitate lawful collective bargaining, but serves only to shield unlawful bargaining by minority unions. In contrast, the Board facilitates lawful collective bargaining when it conducts elections that ensure that employees support it. "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." *Linden Lumber v. NLRB,* 419 U.S. 301, 307 (1974).

Finally, the recognition bar policy instituted in *Lamon's Gasket* is difficult to administer and leads to absurd results. The policy bars elections for least six-months after the parties' first bargaining session (not the date of recognition), and then for up to six more months following that first bargaining session depending on the Region's resolution of a fact intensive, five-part test derived from *Lee Lumber & Building Material Corp.*, 334 N.L.R.B. 399 (2001). *See Lamon's Gasket*, 357 N.L.R.B. at 748.

Because the recognition bar is measured from the date of first bargaining (and not recognition), it can last longer than the one-year certification bar enjoyed by Board-certified unions. This absurd outcome is not hypothetical, but occurred in *Americold Logistics*, 362 N.L.R.B. No. 58 (2015). There, because the employer and union did not hold their first bargaining session until four months after recognition, the Board majority held that an employee election petition filed more than a year after recognition was barred. *Id.*, slip op. at *3-6. *Lamon's Gasket* grants employer-recognized unions greater protections from challenge than Board-certified unions, which is a result that turns Congressional intent on its head.

Lamon's Gasket's reliance on a multi-factor test to determine the existence of a bar after six months also leads to untoward results. The test evaluates if a reasonable time to bargain has elapsed based on the progress the parties have made in negotiations. The test often sets up "heads we win, tails you lose" situation for employees. If the employer and union are far away from an agreement, this indicates that they need a lot more time to bargain. If the employer and union are close to an agreement, this indicates that they need more time to bargain to close their deal. *See MGM Grand Hotel*, 329 N.L.R.B. 464, 465 (1999).

Beyond presenting employees with a Catch-22, the *Lamon's Gasket* reasonable-time-to-bargain test provides employees with little guidance on when an election petition may be honored. Employees are generally not privy to the details of collective

bargaining because employers and unions usually make their sessions confidential. Even if an employee were privy to this information, he or she could only guess if a Region will find the amorphous reasonable-time-to-bargain test to be satisfied. A rational employee faced with the unpredictable test announced in *Lamon's Gasket* has little choice but to successively file multiple election petitions, one after another, in the hope that one might be honored. *See e.g., Student Transp. of Am.*, Case No. 06-RD-127208 (June 5, 2014) (employees faced with similar test used under the Board's "successor bar" doctrine filed four successive decertification petitions over a year-long period until the Region finally granted an election—which the union lost by an overwhelming vote of 88-13). Or, the employee might find the Board's unfathomable five-part test so daunting that he will simply give up.

In short, the recognition bar policy reinstituted in *Lamon's Gasket* is irrational, inconsistent with the Act, contrary to the Act's policy objectives, and difficult to administer. *Lamon's Gasket* should be overruled.

B. The Recognition Bar Should Be Abolished Entirely, or in the Alternative Modified.

If the Board overrules *Lamon's Gasket*, it should abolish the recognition bar in its entirety for the reasons set forth above. There is simply no justification for ever barring employee election petitions based on employer decisions to recognize unions.

In the alternative, if the Board chooses to preserve some vestige of the bar, it should rule that employee election petitions are permitted for six months after employees receive notice that their employer has recognized a union to be their representative, but that petitions are thereafter barred for six months following the expiration of that time period. A six month period for filing election petitions is suggested because it is coextensive with the six month time period in which employees can challenge employer recognitions with an unfair labor practice charges under Section 10(b) of the Act, 29 U.S.C. § 160(b). This rule would harmonize the two procedures, and bring a measure of certainty to employees, employer and unions.

Finally, in lieu of the foregoing two options, Petitioner requests that the Board modify the recognition bar in another way that provides her and her co-workers with the secret ballot election that they seek.

CONCLUSION

The Board should grant the Request for Review; overrule *Lamons Gasket*; abolish or modify the recognition bar, reverse the Regional Director's dismissal of the petition, and order an immediate election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Board Rules and Regulations, on August 23, 2018, Petitioner's Request for Review was filed with the Office of Executive Secretary of the National Labor Relations Board by means of the NLRB's e-filing system and served on the following parties by means of electronic mail:

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